



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: H. Bendzulla Contracting

File: B-246112

Date: November 8, 1991

Sidney J. Cohen, Esq., for the protester.
David W. LaCroix, Esq., Department of the Navy, for the agency.
Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Bid modification submitted by facsimile transmission in response to an invitation for bids that provided that facsimile bids, modifications, or withdrawals would not be considered was properly rejected by the agency.

2. An agency's reasons for rejection of an attempted bid modification, stated in response to the protester's agency-level protest, does not estop the agency from rejecting the bid modification for other, legitimate reasons.

DECISION

H. Bendzulla Contracting protests the rejection of its facsimile transmitted bid modification and award to any other bidder under invitation for bids (IFB) No. N62766-91-B-2020, issued by the Department of the Navy, for the construction of a concrete patio at the United States Naval Station in Guam. The protester contends that it would be the low, responsive bidder if its facsimile transmitted bid modification were considered.

The Navy requests summary dismissal of Bendzulla's protest because Bendzulla's bid is only low if the protester's facsimile transmitted bid modification is considered and the IFB did not authorize facsimile bids or modifications. Bendzulla responds that the agency, in denying Bendzulla's earlier agency protest, stated that Bendzulla's bid modification was rejected because the bid modification was late, and not because the IFB did not authorize facsimile bids or modifications. Bendzulla contends that the Navy's position

in its decision on the agency-level protest waived the agency's right to reject a facsimile transmitted bid modification that was not authorized by the IFB. Bendzulla also argues that the Navy has, by accepting facsimile transmitted bid modifications on other procurements, established a course of conduct that prevents the Navy from now rejecting Bendzulla's facsimile bid modification.

We dismiss the protest.

The IFB contained the standard "Submission of Bids" clause, as set forth in Federal Acquisition Regulation § 52.214-5, which provides that "[f]acsimile bids, modifications, or withdrawals, will not be considered unless authorized by the solicitation." Since the IFB did not authorize facsimile bids, modifications, or withdrawals, the Navy properly rejected Bendzulla's bid modification. See Mabuhay Bldg. Maint. Co., Inc., B-241908, Nov. 23, 1990, 90-2 CPD ¶ 424. Inasmuch as Bendzulla's bid is only low if the facsimile bid modification is considered, its bid was properly not considered the lowest. Id.

Bendzulla's argument that the Navy, by stating a different reason for rejection in response Bendzulla's agency-level protest, waived the right to reject the protester's facsimile transmitted bid modification has no merit. An agency's failure to initially provide the correct reasons for rejecting a bid does not estop the government from rejecting a bid where a valid reason exists for rejecting the bid. See Martin Contracting, B-241229.2, Feb. 6, 1991, 91-1 CPD ¶ 121. Here, as noted above, facsimile bids or modifications could not be accepted. Thus, Bendzulla's facsimile bid modification was properly rejected, regardless of whether the agency initially advanced this reason for the rejection.

The government's conduct on other unrelated procurements does not preclude the Navy from rejecting facsimile bids or modifications that are not authorized by the IFB; each procurement stands on its own, and it is the terms and conditions of this IFB that establish whether facsimile bids or modifications are authorized. See Cobra Tech., Inc., B-238031 et al., Feb. 27, 1990, 90-1 CPD ¶ 242.

The protest is dismissed.



James A. Spangenberg
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